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Supreme Court, U.S.
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No. 00-1107

In the Supreme Court of the United States

ROBERT E. GOLDMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR CERTIORARI

OF COUNSEL:
LISA B. KEMLER
108 NORTH ALFRED ST.
ALEXANDRIA, VA 22314
(703) 684-8000

DAVID ALLEN
Counsel of Record
CASSANDRA STAMM
600 UNIVERSITY ST.
SUITE #3020
SEATTLE, WA 98101
(206) 447-9681

Counsel for Amicus Curiae

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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ARGUMENT

I. Introduction

This case provides the Court the opportunity to review 18 U.S.C. § 401(3) which has been utilized in this case to punish an alleged contempt by an attorney. The question unanswered by this Court's prior decisions is whether 18 U.S.C. § 401(3), which permits a court to punish disobedience of a "lawful writ, process, order, rule, decree, or command," requires, at a minimum, proof of obstruction of the administration of justice when applied to an attorney representing a client at trial where there is no suggestion or evidence of the attorney violating a court order by presenting excluded evidence before the jury.

Absent a ruling by this Court on this important matter, defense counsels' responsibility to provide zealous advocacy will be chilled by a fear that they may run afoul of a judge's order or rule, especially in the context of the instant case where the trial judge's verbal order was as vague and general as telling attorneys that they should not "argue the objection," and where the majority of the alleged contumacious conduct was as brief as two or three word statements indicating grounds for an objection.

The other issue that this Court should review is whether a trial judge, who himself noted he had been "arguably criticized" on two occasions by defense counsel, can conduct the trial on the non-summary contempt, in spite of Fed. R. Crim. P. 42(b)'s clear statement that such a judge is "disqualified."

The power of judges to accuse, try, and imprison for contempt with but limited legal and constitutional protections

for the accused, has the potential to create an atmosphere that chills the essential level of advocacy that a defense attorney must bring into court. A lack of clearly defined principles for the application of the law of contempt has created a state of confusion and uncertainty that may cause defense counsel to view this flexible legal power with fear and concern, to the detriment of their clients who expect and need the highest level of zeal and advocacy.

II. Interest of Amicus Curiae[1]

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is promotion of the proper administration of justice.

The Washington Association of Criminal Defense Lawyers (hereinafter "WACDL") is a non-profit corporation of approximately 700 lawyers, professors, law students and others which strives to improve the quality and administration

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[1] This brief was written wholly by David Allen, Cassandra Stamm and Lisa Kemler on behalf of WACDL and NACDL. Counsel for Mr. Goldman did not author any part of the brief. No other persons or entities made any monetary contribution to the preparation or submission of the brief.

justice and to protect the individual rights guaranteed by the Federal Constitution. Among its stated objectives is to encourage the cooperation and professionalism among counsel and the judiciary.

Amici's interest in this case arises because their members have a substantial interest in the substance and execution of the statutes and rules governing the imposition of criminal contempt sanctions against counsel for criminal defendants. Amici and their members firmly believe that while civility and decorum are consistent with vigorous advocacy, it is equally important that the standards for sanctionable misconduct be clearly defined in a way that does not limit or chill a vigorous and zealous defense in federal criminal cases. The discretion of judges to imprison lawyers for their advocacy, even where the lawyer speaks too loudly or otherwise acts in a manner that might be uncomfortable to some, though not reaching the level of obstruction, must be curtailed.

Pursuant to Supreme Court Rule 37.2(b), WACDL and NACDL have obtained consent from counsel for the Government and from counsel for Mr. Goldman to file this brief.

III. Statement of the Case

The Petitioner, Robert E. Goldman, is an experienced New York trial lawyer who has tried over 300 cases spanning more than 40 years of practice. In 1998, Mr. Goldman represented Miles Galin on charges of fraud in a criminal trial before a jury and the Honorable Judge Stephen V. Wilson in the United States District Court for the Central District of California.

At the beginning of the trial, Judge Wilson told counsel not to leave the lectern without permission and further to state legal grounds but not "argue the objection."

This statement of courtroom procedures became the subject of much controversy and, eventually, the foundation for the majority of Mr. Goldman's contempt convictions. Judge Wilson also reprimanded Mr. Goldman during the trial because his tone of voice was too loud, his arm and hand movements were "obnoxious" or "melodramatic," and because on occasion he stepped away from the podium when examining witnesses. Despite the fact that he had expressly directed the lawyers to "state the legal grounds" while making objections, Judge Wilson frequently reprimanded Mr. Goldman for making *exceedingly* brief statements in response to evidentiary objections, as a means of either preserving error or responding to the objection, while not reprimanding the prosecutor for similar conduct.[2]

Based upon these and other exchanges, Mr. Goldman perceived bias on the part of the trial court. Consistent with his obligation to his client, Mr. Goldman registered appropriate objections to this perceived bias of the Court. For example, during an in-chambers conference, Mr. Goldman complained that:

> the Court's approach to never permitting me to finish a thought before engaging in its own

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[2] For example, on one occasion, Mr. Goldman stated "[g]oes to his state of mind" in response to a prosecutor's hearsay objection, which resulted in a contempt conviction. By contrast, the prosecution's virtually identical response to Mr. Goldman's hearsay objection, *i.e.*, "[s]tate of mind," drew no comment or rebuke whatsoever from the Court.

> momentum only demonstrates a bias which I think at this point, your Honor, is beginning to show the manner in which it is not a fair trial.

Likewise, during closing argument, after the prosecutor had objected nine times, Mr. Goldman, stated: "[y]our Honor, may we have the criticism once directed in [the prosecutor's] direction." In response to this comment and its suggestion of bias, Judge Wilson cited Mr. Goldman for contempt.

Judge Wilson issued an Order to Show Cause, listing fifty-three incidents of allegedly contemptuous conduct under 18 U.S.C. 401(1). Judge Wilson specifically set forth two occasions on which Mr. Goldman criticized him for being biased and also noted that Mr. Goldman's comment during closing argument implying the court was biased, "did in part form the basis for the contempt citation."

Mr. Goldman moved to disqualify Judge Wilson from presiding over his contempt hearing, but his motion was denied by District Judge George H. King.

Judge Wilson subsequently found Mr. Goldman guilty of criminal contempt in violation of 18 U.S.C. § 401(1) and (3) and sentenced him to three days' imprisonment. The prosecution did not take part in the contempt prosecution or hearing. The Ninth Circuit affirmed. United States v. Galin, 222 F.3d 1123 (9th Cir. 2000).

IV. Reasons for Granting the Writ

A. The Ninth Circuit Misconstrued the Standard for Disqualification of the Trial Judge in a Contempt Proceeding.

Judge Wilson improperly presided over Mr. Goldman's contempt hearing despite the fact that the conduct charged involved judicial criticism and allegations of bias.

This Court has held that a judge conducting a contempt trial must be removed if at all involved in the controversy:

> The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feelings against a lawyer.

Offutt v. United States, 384 U.S. 11, 14 (1954).[3]

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[3] See also Sanchez v. United States, 343 U.S. 1, 12 (1952):

> That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir.

The record clearly reflects that Mr. Goldman made comments criticizing Judge Wilson. These criticisms challenged Judge Wilson's impartiality, thereby raising the core concern underlying Rule 42(b), which provides:

> If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. (Emphasis supplied.)

This rule recognizes that the contempt power entrusted to trial judges can be misapplied if the judge has been criticized or has been treated disrespectfully by counsel.

The Ninth Circuit opinion below effectively equated the Rule 42(b) "disrespect" and "criticism" standard with the less rigorous due process requirements, merely explaining that the trial judge was not so "'personally embroiled' with Goldman that disqualification was necessary."[4] 222 F.3d at 1127. In so doing, the Ninth Circuit ignored the record, which demonstrated that the requisites of Rule 42(b) were satisfied, in that the contempt charge involved "disrespect to or criticism" of the trial judge, requiring automatic disqualification.

Moreover, even if a court were to assume, *arguendo*, that the due process "personally embroiled" standard rather than Rule 42(b) governed, the record likewise demonstrates that Judge Wilson became frustrated with Mr. Goldman, not

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[4] Even where a judge remains calm in the face of a personal attack, he must be disqualified if "his personal feelings might reasonably be expected to have been affected. . . ." United States v. Meyer, 462 F.2d 827, 839-40 (D.C. Cir. 1972).

only one or two isolated occasions, but on a virtually continuous basis throughout the duration of the two week trial. Judge Wilson's criticisms, rebukes and warnings to counsel collectively reflect such a level of personal irritation and annoyance with defense counsel such that any reasonable observer would have to conclude that the trial judge was "personally embroiled" in the controversy of the underlying contempt proceedings.

The Ninth Circuit's decision in this case, coupled with its avoidance of Rule 42(b), waters-down the seemingly clear dictates on the rule, in contravention of this Court's holdings:

> The power of contempt which a judge must have and exercise ... is most important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge.

Cooke v. United States, 267 U.S. 517, 539 (1925). Although "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties;" In re Murchison, 349 U.S. 133, 136 (1955); both due process generally and Rule 42(b) specifically nevertheless require recusal.

B. The Ninth Circuit Erred in Holding that Obstruction of Justice was not Required.

1. Obstruction of justice is required to support a violation of 18 U.S.C. 401(3).

A critical question presented in the instant case, necessitated by the trial court's eleventh-hour addition of the additional violation of 18 U.S.C. § 401(3), is whether an attorney's in-court conduct may be punished as criminal contempt, absent a showing of actual obstruction of justice.

Nearly 40 years ago, this Court held:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.

In re McConnell, 370 U.S. 230, 236 (1962); see also, In re Michael, 326 U.S. 224, 228 (1945) ("that element (obstruction) [*sic*] must clearly be shown in every case where the power to punish for contempt is exerted"); In re Little, 404 U.S. 553, 555 (1972) (the conduct at issue "must constitute an imminent, not merely a likely, threat to the administration of justice.").

Despite this Court's holdings, the Ninth Circuit below held that obstruction of justice was not a prerequisite to criminal contempt under 18 U.S.C. § 401(3) even though the contemnor was an attorney defending a criminal defendant and many of the contempt counts related to very brief

statements of grounds for objections or admissibility of evidence. In so ruling, the Ninth Circuit contradicted not only its own precedents,[5] but also this Court's holdings in McConnell, Michael, and Little, *supra*.

The decision below is remarkable in light of the resulting dilemma it creates for defense attorneys. Mr. Goldman was told on the one hand not to argue objections and reprimanded for even the briefest statements of legal grounds -- he was also, however, duty-bound to zealously represent his client in all facets of the criminal case, including explaining the grounds for his questions or objections, in a short and succinct non-argumentative fashion, as Mr. Goldman did throughout the trial, with the hope of educating the judge to his position. An attorney should be able to briefly reply to an opponent's objection, succinctly stating the legal ground, without further argument, in hopes that the court will reconsider. Such conduct can hardly be equated with contempt -- instead it should be considered good lawyering.[6]

A statement by the trial judge to not argue objections cannot be considered a reasonably specific order to cease such conduct.[7] The import of the opinion below is that by the

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[5] Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978); Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973) cert. denied, 414 U.S. 1161 (1974).

[6] "[T]rial attorneys are ethically obligated to argue with the court, to challenge its actions, and to attempt to change its mind." In re Holloway, 995 F.2d 1080, 1097 (D.C. Cir. 1993) (Mikva, J., dissenting).

[7] A comparable oral instruction not to "argue with me when I rule" was "not sufficiently definite or specific to support a contempt

Ninth Circuit's reasoning even a trivial violation of a broad or general oral rule of a trial judge can be punished as criminal contempt under 18 U.S.C. 401(3) regardless of whether the administration of justice was obstructed in any way.[8]

Where the briefest statement of grounds on an objection is inconsistently criticized and punished by a trial judge, the effect is a trial attorney must stand mute and not even attempt to clarify the grounds for his objection or the reason for a question, or else face the prospect of a criminal conviction and imprisonment. This creates a terrible conflict for the attorney, who in exercising his sworn duties to zealously represent his client, cannot even state, clarify or expand the ground for his objection or the reason for a question, without risking contempt. In this context, the accused will be the loser, and the interests of justice will suffer.

2. Petitioner's conduct did not constitute obstruction of justice.

Judge Wilson, in his post-trial Order, found that Mr. Goldman obstructed the administration of justice by wasting the court's time due to "unnecessary sidebars and recesses," caused by his conduct. The court also found that Mr. Goldman's conduct caused "general disruptions" due to his "shouting, walking around the courtroom, pointing, and addressing remarks to the prosecutor." However, the record does not support these findings.

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citation." United States v. West, 21 F.3d 607, 609 (5th Cir. 1994).

[8] This is hardly the "reasonably specific order of the court" that is required as a basis for a 18 U.S.C. 401(3) violation. Doe v. Maywood Hous. Auth., 71 F.3d 1294, 1297 (7th Cir. 1995).

The specifications and findings on contempt regarding "arguing objections" demonstrate that at most Mr. Goldman only said a few words detailing the ground for an objection or the justification for his questions.[9]

With regard to the allegation of not following courtroom protocol, the record reveals only a few occasions where the judge told Mr. Goldman to either not approach the witness or not walk into the well of the courtroom. Mr. Goldman did not respond in any contemptuous or rude manner, but instead apologized and returned immediately to the lectern as he was directed. There is no indication that this wasted any significant amount of time or disrupted the trial.

Another contempt citation that reveals the tenor of the trial judge's rulings occurred when the jury was excused, the prosecutor was reading from the transcript and Mr. Goldman merely asked the prosecutor to tell him from what page of the transcript he was reading, when he was harshly criticized and directed by the court to not talk to the prosecutor.

Perhaps most revealing is the fact that Mr. Goldman was cited for contempt for merely requesting permission to argue outside the presence of the jury:

> The Court: I'm not inviting this argument in front of the jury.

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[9] There are no instances of cited contempt where Mr. Goldman did more than say a few words, briefly explaining the reason for his question or objection. He never introduced prohibited or excluded facts in front of the jury.

> Mr. Goldman: [Let's] take a break and let me argue outside the presence of the jury, Your Honor.

In terms of alleged contempt relating to the amplitude of Mr. Goldman's voice, the judge on occasion told Mr. Goldman to lower his voice during a sidebar conference, not an unusual occurrence at trial. On another occasion, the judge complained that Mr. Goldman was "shouting" in his chambers, obviously once more outside the presence of the jury.

None of the actions ascribed to Mr. Goldman can satisfy the necessary requirement of obstruction of the administration of justice. Using contempt proceedings "to punish attorneys for over-zealous advocacy is contrary to the important principle of maintaining an independent and assertive bar." Matter of Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988).

Attorneys must be given "great latitude" and extreme "liberty" in the area of vigorous advocacy:

> Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting on their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows.

Matter of Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).

In the instant case, the alleged contumacious conduct of Mr. Goldman did not result in physical disorder in the courtroom, there was no laughter, shouts, insults or abusive

language directed at the judge and there was no actual disruption of the trial proceedings. Any delay was no more than the routine interruptions that commonly take place in criminal trials. The record demonstrates that the judge became overly sensitive and critical of Mr. Goldman, criticizing his actions while taking no notice of the prosecutor's same or similar conduct. This is especially demonstrated by Judge Wilson's not even permitting Mr. Goldman to speak in a chambers conference, cutting him off rudely on several occasions when he was merely trying to make a point for the record.

In fact, Judge Wilson could be reasonably criticized for unfairly cutting off Mr. Goldman's very brief statement of grounds. An attorney's brief and non-contentious explanation of his legal position helps the orderly administration of justice:

> counsel must be given substantial leeway in pressing his contention, for it is through such colloquy that the judge may recognize his mistake and prevent error from affecting the record. It is, after all, the full intellectual exchange of ideas and positions that best facilitates the resolution of disputes.

Dellinger, 461 F.2d at 398-99.

C. The Decision of the Ninth Circuit Calls for Exercise of the Court's Supervisory Power in Order to Avoid a Chilling Effect on Zealous Representation of Criminal Defendants.

As this Court has repeatedly stated: "an independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice." McConnell, 370 U.S. at 236. Indeed, "[h]ard-fought, energetic and honest representation is at the bedrock of our judicial process." In re Yagman, 796 F.2d 1165, 1182, mod'd, 803 F.2d 1085 (9th Cir. 1986).

It is intolerable to convict an attorney for contempt for merely stating the legal grounds for his question in response to an objection in a case where his client's very liberty is at stake.[10] All attorneys, especially those practicing criminal defense, have a duty to make and preserve a record for appeal. F.R.E. 103. Mr. Goldman's brief statements of grounds for questions and objections could only be considered "argument" under the broadest and most expanded definition of that term. Such a broad interpretation cannot support a conviction for criminal contempt.

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[10] Interestingly, in a case where Judge Wilson was the trial judge, the Ninth Circuit observed that the propriety of threat to hold one in contempt for objecting would be "questionable given the ethical and constitutional obligations under which defense counsel labors." United States v. Moorehead, 57 F.3d 875, 879 n.2 (9th Cir. 1995).

V. Conclusion

For the foregoing reasons, this Court is urged to grant the Petitioner's Writ of Certiorari and review this case.

Respectfully submitted,

/s/_____

DAVID ALLEN
Counsel of Record
CASSANDRA STAMM
Washington Association of
Criminal Defense Lawyers
600 University St.
Suite #3020
Seattle, WA 98101
(206) 447-9681

Of Counsel:
LISA B. KEMLER
National Association of
Criminal Defense Lawyers
108 North Alfred St.
Alexandria, VA 22314
(703) 684-8000

Counsel for Amicus Curiae